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### Making "Friends" with the #Ethics Rules: Avoiding Pitfalls in Professional Social Media Use

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**MAKING ‘FRIENDS’ WITH THE #ETHICS RULES: AVOIDING PITFALLS  
IN PROFESSIONAL SOCIAL MEDIA USE?**

*Cynthia Dahl\**

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## I. INTRODUCTION

Keeping abreast of new technologies and in particular new uses of social media is a necessity for an intellectual property (“IP”) law practitioner in 2014–2015. Social media has in many ways made things more complicated for IP lawyers. It provides various and bountiful new ways to infringe a trademark or distribute counterfeit goods and allows simple and widespread distribution of copyrighted information. Additionally, protective cease and desist letters must be drafted with the knowledge that they may be posted and “go viral” on social media, potentially exposing a client to a damaging public relations backlash.

In addition to the special attention IP lawyers must give to social media when counseling clients, it would be logical to assume that IP lawyers would be the experts of the legal industry on proper professional use of social media for another reason. After all, two of our primary client constituencies are science and technology companies. If not IP lawyers, which other type of lawyer would be better suited to model how to use social media correctly for professional success? Our colleagues may be counting on us to be the vanguard of the profession.

Yet this is a hard expectation to meet. Even as IP lawyers fully embrace personal and professional social media use, how and when such use may implicate the professional rules of conduct is complicated and fraught with inconsistencies.

Some help is on the way. The ABA updated its Model Rules of Professional Conduct (“MR” or the “Rules”) in August 2012 with amendments proposed by a specially-convened “ABA Commission on Ethics 20/20” to take into account all manner of electronic communication, including social media.<sup>1</sup> These new amendments to the Rules are now being considered for adoption in many states.<sup>2</sup> Likewise, the bar associations of several states and cities have

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<sup>1</sup> See ABA Comm’n on Ethics 20/20, *Revised Resolution 105A* (Aug. 6, 2012) (as amended), [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120808\\_revised\\_resolution\\_105a\\_as\\_amended.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120808_revised_resolution_105a_as_amended.authcheckdam.pdf); see also ABA Comm’n on Ethics 20/20, *August 2012 Proposals*, [http://www.americanbar.org/content/dam/aba/administrative/ethics\\_2020/20120415\\_one\\_page\\_summary\\_of\\_august\\_proposals.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20120415_one_page_summary_of_august_proposals.authcheckdam.pdf) (last visited Jan. 24, 2015).

<sup>2</sup> As of January 24, 2015, the amendments have been adopted at least in part in AR, CT, DE, ID, IA, KS, NV, NM, NC, OR, PA, WV, and WY. For a chart showing state by state progress of adoption of the 20/20 amendments, see ABA Ctr. for Prof’l Responsibility Policy Implementation Comm., *State by*

attempted to help practitioners navigate the ethical waters as to social media use with guideline documents and advisory opinions issued by their committees on professional ethics.<sup>3</sup> But the Rules do not provide much guidance for certain common situations, the opinions from the different bar associations often contradict each other,<sup>4</sup> and not all issues are resolved by the judiciary or explained in guidelines.<sup>5</sup> As a result, conduct that may be perfectly ethical and appropriate in one jurisdiction can spark an allegation of misconduct in another.

Is the solution to avoid social media in a professional context altogether? Not only would that be economically foolish, but also avoiding technology might in and of itself be unethical. According to a new comment to MR 1.1, to “maintain the requisite knowledge and skill, a lawyer should keep abreast of . . . the benefits and risks associated with relevant technology . . . .”<sup>6</sup> Practitioners must embrace change and confront the ethical questions directly, even as the debates continue within legal regulatory bodies.

What follows is an analysis of the most relevant developments in this area, where common uses of social media implicate ethics rules. Although the issues are relevant to all attorneys, they may particularly impact IP practitioners because of their interest in and necessary focus on social media. This article discusses four salient topics, chosen because they are either unsettled, highly common, implicate rules that are easy to violate, or all three. Part II considers when posting (actively or passively) implicates advertising and solicitation rules. Part III discusses maintaining client confidentiality while posting. Part IV gives guidance on how to use social media to gather information during discovery. Finally, Part V discusses using social media in court.

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*State Adoption of Selected Ethics 20/20 Commission Policies and Guidelines for an International Regulatory Information Exchange* (Nov. 17, 2014) [hereinafter *State by State Adoption*], [http://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/state\\_implementation\\_selected\\_e\\_20\\_20\\_rules.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/state_implementation_selected_e_20_20_rules.authcheckdam.pdf).

<sup>3</sup> See, e.g., *Guidelines for Networking Sites*, FLA. BAR STANDING COMM. ON ADVER. (Apr. 16, 2013); Conn. Bar Ass’n Prof’l Ethics Comm., *Informal Opinion* 2012-03 (Apr. 25, 2012); N.Y. City Bar Ass’n Comm. on Prof’l Ethics, *Formal Op.* 2012-2 (2012).

<sup>4</sup> See *infra* Parts II–V.

<sup>5</sup> See, e.g., *infra* Part II.B.1 (explaining that states have not addressed whether a customer success story posted on a forum like Avvo constitutes a “testimonial” and, if so, how an attorney should respond).

<sup>6</sup> MODEL RULES OF PROF’L CONDUCT R. 1.1 cmt. 8 (2013).

For purposes of the discussion, this article focuses on LinkedIn, Twitter, Facebook, and, to a lesser extent, Avvo and blogs, since these are the social media formats that most IP practitioners have already experienced. The issues presented in this article, however, apply to all platforms. This article refers to the Rules themselves as well as the state-adopted versions, advisory non-binding opinions from city and state bar associations, guideline documents circulated by state bar association committees, and state supreme court cases. This article highlights ethical issues and points out inconsistencies of interpretation not in an effort to make the use of social media intimidating, but rather to offer a framework from which a practitioner may act with more confidence and better gauge the appropriate time to seek a second opinion. One thing is clear: practitioners must consider these issues, research the ethics opinions of state and local bar associations and rulings of state courts, and take control of their online presence whether or not it has been a significant part of their legal practice thus far.

## II. WHEN POSTING INFORMATION BECOMES AN ADVERTISEMENT

IP practitioners use social media for a variety of professional purposes. It is an efficient way to communicate with clients, announce successes, contribute to the legal community in the form of blogs and newsletters, and reach prospective new clients. There are limits, however, to what a practitioner may post within the bounds of the ethics rules. Some of the easiest rules to violate are the rules regulating advertising. These issues apply both when a lawyer posts about herself and when others post about her.

### A. *When Posting About Oneself May Violate Ethics Rules on Advertising*

Most states have adopted some version of MRs 7.1–7.4, which control what an attorney can say, to whom, under what conditions, and using what format when the communication concerns the attorney’s services, particularly when the communication is designed to attract clients.<sup>7</sup> Generally there are three levels of requirements under the rules, as follows: (1) the least restrictive rules concern all attorney communication about services;<sup>8</sup> (2) more restrictive rules

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<sup>7</sup> MODEL RULES OF PROF’L CONDUCT R. 7.1–7.4 (2013).

<sup>8</sup> MODEL RULES OF PROF’L CONDUCT R. 7.1 (2013) (Communication Concerning A Lawyer’s Services).

concern attorney advertising;<sup>9</sup> and (3) the most restrictive rules concern when that advertising constitutes solicitation.<sup>10</sup>

### 1. Posting a Social Media Profile

Posting a profile on social media when it is used to “promote the lawyer or law firm’s practice” is advertising.<sup>11</sup> Even posting a profile consisting of only bare contact information and qualifications can implicate the Rules.<sup>12</sup> There are at least two issues to keep in mind when creating a profile for social media sites like Facebook or LinkedIn: (1) information cannot be false or misleading (i.e., it cannot contain “a material misrepresentation of fact or law”);<sup>13</sup> and (2) the attorney must not claim she is an expert or has a specialty without appropriate justification and possibly disclaimers.<sup>14</sup>

There are a surprising number of risks in accomplishing this simple task. To take an IP-specific example, under MR 7.4, an attorney may not necessarily state on her profile that she “specializes in patent law,” even if patent law makes up more than fifty percent of her practice. This statement could imply that she is certified to practice before the USPTO. If she is not in fact a member of the Patent Bar, this statement would run afoul of MR 7.4. In fact, this exact example is one of the exceptions under MR 7.4: an attorney may not post information that states or implies that she is certified in a specialty unless she (a) has been admitted to the Patent Bar; (b) engages in Admiralty practice; or (c) is (i) “certified as a specialist by an organization that has been approved by an appropriate state authority or that has been accredited by the American Bar Association; and [if]

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<sup>9</sup> MODEL RULES OF PROF’L CONDUCT R. 7.2 (2013) (Advertising).

<sup>10</sup> MODEL RULES OF PROF’L CONDUCT R. 7.3 (2013) (Solicitation of Clients).

<sup>11</sup> See *Guidelines for Networking Sites*, *supra* note 3.

<sup>12</sup> See, e.g., *Quick Facts About Legal Ethics and Social Networking*, VIRGINIA STATE BAR, <http://www.vsb.org/site/regulation/facts-ethics-social-networking> (last visited Jan. 25, 2015) (“Statements made on social networks about a lawyer’s services may be subject to the advertising rules.”).

<sup>13</sup> *Id.*

<sup>14</sup> See MODEL RULES OF PROF’L CONDUCT R. 7.4 (2013). For an example of a required disclaimer, see N.Y. MODEL RULES OF PROF’L CONDUCT R. 7.4(c)(2) (2013).

(ii) the name of the certifying organization is clearly identified in the communication.”<sup>15</sup>

Some states have enacted even stricter versions of MR 7.4. For example, New York not only limits when a practitioner may call herself a specialist or state that she specializes in a particular field, but also requires a prominently posted disclaimer to accompany the label.<sup>16</sup> Although the disclaimer was successfully challenged in the Second Circuit,<sup>17</sup> the court did uphold the constitutionality of one portion of the disclaimer—albeit under some uncertainty—by declaring that portion was void for vagueness as applied to the particular facts of the case.<sup>18</sup> Because the Grievance Committee (the professional conduct overseeing body appointed by the Appellate Division of the New York State Supreme Court) does not offer advisory opinions, lawyers practicing in New York have little guidance about how to comply with these requirements.<sup>19</sup>

Is it as simple as listing skills and practice areas without calling them “specialties?” Can a lawyer instead call herself an “expert,” or is that also problematic? Does she merely have to avoid the use of these specific terms? The social media platforms’ formats complicate matters. It is difficult, for example, to fit a long disclaimer on a Twitter profile. In addition, what can a lawyer do when a platform, like LinkedIn for example, allows outside parties to endorse her or automatically labels sections with hot-button terms like “Specialties” or “Skills and Expertise?”

Although a specific discussion of the Endorsement feature is in Part II, it is worth mentioning here that several state bar associations—as well as individual lawyers—realized that the LinkedIn labeling could present an important ethical obstacle and alerted LinkedIn.<sup>20</sup> Lawyers are an important

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<sup>15</sup> MODEL RULES OF PROF’L CONDUCT R. 7.4 (2013).

<sup>16</sup> N.Y. RULES OF PROF’L CONDUCT R. 7.4(c)(2) (2013).

<sup>17</sup> *Hayes v. N.Y. Attorney Grievance Comm. of the Eighth Judicial Dist.*, 672 F.3d 158, 170 (2d Cir. 2012).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* (“[The former principal counsel to the Grievance Committee] added that the Committee did not provide advisory opinions because, in part, ‘it would probably take up most of our work.’”).

<sup>20</sup> Interview with Catalin Cosovanu, Senior Prod. Counsel, LinkedIn (Mar. 11, 2014) [hereinafter Interview with Catalin Cosovanu]; see James Dedman, *The South Carolina Bar and the LinkedIn “Loophole,”* ABNORMAL USE (Mar. 4, 2013),

constituency of LinkedIn, making up 770,000 of their 100 million registered members.<sup>21</sup> LinkedIn had already been considering ways to address the issue, and instituted two fixes: (1) as of January 2014 it changed the “Skills and Expertise” section in the individual profile to read “Skills and Endorsements;” and (2) as of late 2013 a “Specialties” default setting no longer appeared when a user created her profile section at the top of the homepage.<sup>22</sup> LinkedIn considers this issue resolved.<sup>23</sup>

LinkedIn’s actions likely had a mollifying effect. The Florida Bar Committee on Advertising voted on March 11, 2014 not to pursue a planned Advisory Opinion.<sup>24</sup> This is especially significant because the Florida Bar is extremely active in the lawyer advertising and social media space, as evidenced by its decision to (1) incorporate social media concepts into its rules on lawyer advertising (effective May 1, 2013),<sup>25</sup> and (2) issue both Guidelines for Networking Sites<sup>26</sup> and a Handbook on Lawyer Advertising and Solicitation.<sup>27</sup>

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<http://abnormaluse.com/2013/03/the-south-carolina-bar-and-the-linkedin-loophole.html>; *Update: Complying with Bar rules on LinkedIn may be easier than thought*, FLA. BAR NEWS (Jan. 1, 2014), <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/0e9ba4af36b1dbb785257c4a004c633e!OpenDocument>; Julie Kay, *New Florida Bar Advertising Rules Vex Lawyers*, DAILY BUS. REV. (Sept. 25, 2013), <http://www.dailybusinessreview.com/id=1202620801693/New+Florida+Bar+Advertising+Rules+Vex+Lawyers%3Fmcode=0&curindex=0&curpage=ALL>.

<sup>21</sup> Dennis Kennedy & Allison C. Shields, *LinkedIn: How to grow, nurture your network and obtain results*, YOURABA (May 2012), <http://www.americanbar.org/newsletter/publications/youraba/201205article01.html>.

<sup>22</sup> Interview with Catalin Cosovanu, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> Interview with Elizabeth Tarbert, Ethics Counsel, Florida Bar (Mar. 11, 2014) [hereinafter Interview with Elizabeth Tarbert].

<sup>25</sup> *New Advertising Rules Adopted*, THE FLA. BAR (Jan. 2013), [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/DDEE1897BE68E11E85257B0A007B517D/\\$FILE/Summary%20of%20Changes%20to%20the%20Ad%20Rules.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/DDEE1897BE68E11E85257B0A007B517D/$FILE/Summary%20of%20Changes%20to%20the%20Ad%20Rules.pdf?OpenElement).

<sup>26</sup> *Guidelines for Networking Sites*, *supra* note 3.

<sup>27</sup> *Handbook on Lawyer Advertising and Solicitation*, FLA. BAR STANDING COMM. ADVER. (Mar. 20, 2014), available at <https://www.floridabar.org/TFB/>



Many firms believe that the Florida Rules concerning social media are some of the most restrictive in the country,<sup>28</sup> due to, among other things, the many additional requirements they place on communication that might be advertising.<sup>29</sup>

Even if LinkedIn appeared to reassure the Florida Bar, however, the issue may not be completely resolved in other states.<sup>30</sup> The nature of even the new “Skills and Endorsements” section remains problematic.<sup>31</sup>

## 2. Blogging or Posting About the Law

Does posting a newsletter or article on a site constitute advertising? Intellectual property is one of the most vibrant and variable areas of the law. Most practitioners would agree that blogging is a great way to join the legal debate and gain credibility as an expert in the field, which would hopefully attract future clients. But does this act, in and of itself, constitute advertising?

According to the New York State Bar Association Committee on Professional Ethics, the answer is probably not.<sup>32</sup> Blogs and other posts about the law are considered to be mostly educational in purpose, even if they have an indirect “rain-making” function.<sup>33</sup> State bar associations also agree that a

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TFBResources.nsf/Attachments/3AC2BAA33CF257D885256B29004BDEE8/\$FILE/Adv%20Handbook.pdf?OpenElement.

<sup>28</sup> Kay, *supra* note 20.

<sup>29</sup> See, e.g., David L. Hudson Jr., *Firm Challenges Florida Bar Over Website Ad Limits*, ABA JOURNAL, [http://www.abajournal.com/magazine/article/firm\\_challenges\\_florida\\_bar\\_over\\_website\\_ad\\_limits/](http://www.abajournal.com/magazine/article/firm_challenges_florida_bar_over_website_ad_limits/) (Firm plaintiff attorney states, “Florida easily has the most restrictive rules on attorney advertising in the country.”) (last visited Jan. 25, 2015).

<sup>30</sup> For example, South Carolina, *see infra* Part II.B.

<sup>31</sup> *Id.*

<sup>32</sup> N.Y. State Bar Ass’n Comm. Prof’l Ethics, Formal Op. 967, 2 (2013), *available at* <http://www.nysba.org/CustomTemplates/Content.aspx?id=28100>.

<sup>33</sup> See generally Phila. Bar Ass’n Prof’l Guidance Comm., Formal Op. 2010-6, 7 (2010), *available at* <http://www.philadelphiabar.org/WebObjects/PBAREadOnly.woa/Contents/WebServerResources/CMSResources/Opinion%202010-6.pdf>. Blogging is acceptable under the Rules because the person reading can decide on his/her own time if and when to respond.

practitioner may answer legal questions posed by the public online,<sup>34</sup> as occurs on many websites and on the social media platform Avvo (although this practice may implicate other ethical issues).<sup>35</sup> In general, as long as the primary purpose of posting information is not to encourage retaining the lawyer, this sort of posting is permissible.<sup>36</sup>

### 3. Posting About Professional Successes

Posting about professional successes is where the analysis gets nuanced. Merely reporting facts, as long as they are not false or misleading, will likely not implicate the advertising rules (although this practice may implicate confidentiality issues—see *infra* Part III). Putting issues of client consent aside, tweeting that a trial is over, or posting on a Facebook page that a deal successfully closed or other sorts of publicly available information, is probably acceptable under the Rules, provided that the information is verifiable and true. But, if the announcement either requests future business or intimates that a lawyer could deliver an equally successful result for a new client, the ethics rules on advertising would apply.

As an example, the State Bar of California considered hypothetical remarks by a practitioner on her social media profile page. It concluded that a post stating: “Case finally over. Unanimous verdict! Celebrating tonight” was not an advertisement. In contrast: “Won a million dollar verdict. Tell your friends to check out my website,” was considered a “communication” for the purpose of the state’s advertising and solicitation rules, as was the addition of

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<sup>34</sup> N.Y. State Bar Ass’n Comm. Prof’l Ethics, Formal Op. 899, 2 (2011), available at [http://old.nysba.org/AM/Template.cfm?Section=Ethics\\_Opinions&template=/CM/ContentDisplay.cfm&ContentID=60961](http://old.nysba.org/AM/Template.cfm?Section=Ethics_Opinions&template=/CM/ContentDisplay.cfm&ContentID=60961); N.C. State Bar Ethics Op. 8, 2 (2011), available at <http://www.ncbar.com/ethics/ethics.asp?page=488>.

<sup>35</sup> The answers to the questions must remain general enough to avoid creating an attorney-client relationship, and therefore chance violations of confidentiality obligations under MR 1.6; practitioners should also be wary of being seen to be practicing law in another jurisdiction in violation of MR 5.5.

<sup>36</sup> N.Y. State Bar Ass’n Comm. Prof’l Ethics, Formal Op. 899.

the last sentence in the following: "Another great victory in court today! My client is delighted. Who wants to be next?"<sup>37</sup>

Under MR 7.2, a communication is an advertisement when it "involves an active quest for clients."<sup>38</sup> As in the hypothetical statements from the California Bar, sometimes posting about professional successes can constitute advertising. What does that mean in practice? Once a communication becomes an advertisement, not only must it comply with MR 7.1 such that it is truthful, not misleading, and not likely to create unjustified expectations in the mind of a client, but it also must comply with additional notice requirements of MR 7.2.<sup>39</sup> For example, under Florida's version of MR 7.2, advertisements must include the name and location of the firm responsible for the content, so that recipients would know where the attorney is located.<sup>40</sup> This can be very challenging in the context of social media.

Some Florida attorneys have complained about the new Florida rules, wondering how to comply.<sup>41</sup> Do they really have to list the information on every post? Given the 140-character limit, is it advisable or even possible to require users of Twitter to include a name and office location in every tweet? The Florida Bar Association's suggestion is for a user to change his Twitter handle to include his firm name, and use accepted abbreviations for his office location in the tweet,<sup>42</sup> thereby including the information in a space-saving way. There is also a location function in Twitter that, once enabled, broadcasts a location in a separate line under the tweet, thereby preserving space in the message.<sup>43</sup> But the Florida Bar is clearly not modifying the notice requirement for social media posts, and has not yet issued an advisory ethics opinion about whether using this space-saving function would comply with the requirement, which could be problematic because the rule requires advertisements to show the location of the

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<sup>37</sup> Cal. State Bar Comm. Prof'l Responsibility & Conduct, Formal Op. 2012-186, 5 (2012), available at <http://ethics.calbar.ca.gov/portals/9/documents/opinions/cal%202012-186%20%2812-21-12%29.pdf>.

<sup>38</sup> MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 1 (2013).

<sup>39</sup> MODEL RULES OF PROF'L CONDUCT R. 7.2 (2013).

<sup>40</sup> Kay, *supra* note 20.

<sup>41</sup> *Id.*

<sup>42</sup> Interview with Elizabeth Tarbert, *supra* note 24.

<sup>43</sup> *Adding your location to a Tweet*, TWITTER, available at <https://support.twitter.com/articles/122236> (last visited Jan. 1, 2015).

office, not the device that is sending the tweet. Until this is settled, lawyers that live in a jurisdiction that imposes additional notice requirements on text classified as advertising should determine a way to include the location of their firm in their social media messages (and of course will need to keep their messages brief to accommodate).

An important additional point is that a lawyer's services need not cost anything for a communication to be considered advertising. Even if a lawyer offers a free consultation or even offers all services for free, according to at least one state, upon signaling "availability for professional employment," he is advertising.<sup>44</sup>

#### 4. Specifically Soliciting Business

Similar to messages sent in the offline world through more traditional means, advertising messages over social media sent beyond a lawyer's circle of "followers," "friends," and "connections" (and not to a current or former client or family member) are subject to the rules concerning solicitations. MR 7.3 guides the situation when a lawyer sends messages out to recipients that have not specifically opted in to receive them.<sup>45</sup>

Public policy around the Rules protects the consumer from the overreaching lawyer trying to solicit business when the consumer is ill equipped to make an informed decision about whom to hire to represent her.<sup>46</sup> Under the Rules, communication that falls under the solicitation requirements must not only comply with all the requirements of verifiability and veracity, but must also be specifically labeled "Advertising Material" and must not be delivered as a "real-time" contact.<sup>47</sup>

"Real-time" contact has traditionally meant face-to-face contact or contact over a telephone, where a person may have difficulty resisting persuasive techniques.<sup>48</sup> Can electronic communications ever constitute "real-time" contact?

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<sup>44</sup> Cal. State Bar Comm. Prof'l Responsibility & Conduct, Formal Op. 2012-186.

<sup>45</sup> MODEL RULES OF PROF'L CONDUCT R. 7.3 (2013)

<sup>46</sup> See MODEL RULES OF PROF'L CONDUCT R. 7.3 cmt. 2 (2013).

<sup>47</sup> MODEL RULES OF PROF'L CONDUCT R. 7.3 (2013).

<sup>48</sup> See, e.g., LEGAL ETHICS—THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY § 7.3-2 (Ronald D. Rotunda & John S. Dzienkowski ed., 2013–2014) ("The drafters of the 2002 Rules added the reference to real-time

The answer is unclear. Many states specifically characterize chat rooms as “real-time” contact but have determined that e-mail is not.<sup>49</sup> States, however, do not address whether other forms of electronic communication are similarly “real-time.”<sup>50</sup> Is InMail on LinkedIn or a direct message on Twitter “real-time” communication? In both of these instances, a user can target someone outside of her network specifically and in a direct way (similar to knocking on their electronic door), but the recipient may not feel pressure to respond immediately (if ever).

For those states that have adopted the 20/20 changes to the Model Rules, MR 7.3 explains specifically that electronic formats do not constitute “real-time contact” for purposes of solicitation.<sup>51</sup> Messages sent to potential clients are acceptable as long as they meet the other requirements under the Rules.<sup>52</sup> The Philadelphia Bar has specifically attempted to clarify the issue: “[PA Model] Rule 7.3 does not bar the use of social media for solicitation purposes where the prospective clients to whom the lawyer’s communication is directed have the ability, readily exercisable, to simply ignore the lawyer’s overture, just like they could a piece of directed, targeted mail.”<sup>53</sup> But there are confusing outcomes. For advertising purposes, Florida makes a distinction between the rules an attorney need follow if he posts over a public Twitter account versus if his tweets only go out to followers.<sup>54</sup> Yet, if an attorney limits his posting to only followers, his tweets are not viewable even by potential clients that seek him out. This interpretation of the solicitation rules may be overreaching and counteract the

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electronic contact because they believed that it was similar to live in-person or telephone contact.”).

<sup>49</sup> See, e.g., Fla. Bar Standing Comm. Advertising, Advisory Op. A-00-1 (2010); Ill. Bar Ass’n, Advisory Op.96-10 (1997); Mich. Bar, Ethics Op. RI-276 (1996); Utah Bar Ethics Advisory Op. 97-10 (1997).

<sup>50</sup> See, e.g., TEX. DISCIPLINARY RULES OF PROF’L CONDUCT R. 7.03 cmt. 1 (2010).

<sup>51</sup> MODEL RULES OF PROF’L CONDUCT R. 7.3 cmt. 3 (2013) (“This potential for abuse inherent in direct in-person, live telephone or real-time electronic solicitation justifies its prohibition . . . communications can be mailed or transmitted by email or other electronic means that do not involve real-time contact and do not violate other laws governing solicitations . . . without subjecting the public to direct in-person, telephone or real-time electronic persuasion that may overwhelm a person’s judgment.”).

<sup>52</sup> *Id.*

<sup>53</sup> Phila. Bar Ass’n Prof’l Guidance Comm., Formal Op. 2010-6.

<sup>54</sup> *Guidelines for Networking Sites, supra* note 3.

public's interest in being able to search for and find competent counsel. As another example of a confusing result, some states have specifically stated that electronic formats can constitute "real-time contact," but only if the message sent in this manner seeks pecuniary gain.<sup>55</sup>

It is critical to check the applicable state's rules and advisory opinions to see where any specific state falls on the spectrum. Whether or not sending a solicitation through a specific electronic format constitutes a "real-time" contact might depend on the intent of the sender, the method of delivery or sometimes on a combination of the two.<sup>56</sup>

**B. *When Others' Posts About You May Violate Ethics Rules on Advertising***

**1. *Third Parties Posting to Your Profile***

Although the Rules regarding advertising may be confusing, at least when a lawyer is doing her own posting, she can control what is said. Yet the appeal of social media is that a conversation may grow organically among a community of people, with or without any one person's input. What happens when one party posts a comment endorsing another party's work, and that comment is visible to potential clients? This happens specifically with the Endorsements and Recommendations features in LinkedIn and the rating feature in Avvo. What is a practitioner's responsibility to check and verify her third party endorsements, recommendations or ratings? Sites like Martindale Hubbell, Avvo and superlawyers.com even create a profile without the subject's knowledge or consent, and populate it with data gathered from public sources or through FOIA requests. Can these profiles, created without consent or even knowledge, subject a lawyer to liability for violating advertising rules? The short answer is yes.

The South Carolina Bar stated that users are responsible for all information on their profiles, no matter what the source, from the moment that

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<sup>55</sup> N.Y. RULES OF PROF'L CONDUCT R. 7.3 cmt. 9 (2010).

<sup>56</sup> Richard C. Klein, *The Advent of Social Networking: Addressing the Model Rules on Attorney Advertising and Solicitation*, 5 BIOTECHNOLOGY & PHARMACEUTICAL L. REV. 60, 78–80 (2012) (discussing an "intent-based" approach, "categorical" approach, and "hybrid" approach).

they take control of the information.<sup>57</sup> “By claiming a website listing, a lawyer takes responsibility for its content and is then ethically required to conform the listing to [the communication and advertising rules].”<sup>58</sup> At least for now, if there is a profile out there concerning a lawyer, once he “claims” it, he is responsible for monitoring its use. For example, in Florida, if a lawyer becomes aware that a third party has posted information about him on a site that the third party controls, he must ask the third party to remove or change whatever is incorrect or misleading in order to be excused from liability.<sup>59</sup>

What liability would ensue? As with anything that a lawyer posts herself, information must not be false and misleading under MR 7.1.<sup>60</sup> Lawyers should clearly remove or hide any endorsements for skills outside their practice areas or comments that are not true. But are even true endorsements a problem? If a lawyer leaves endorsements on her profile, is she claiming a specialty or indicating an expertise in violation of MR 7.4? Even as LinkedIn has changed the obviously problematic labels, does the problem remain? Or are endorsements at best similar to the Facebook “like”—ubiquitous and therefore almost meaningless?

The South Carolina Bar gives guidance to its members to leave their endorsements on their LinkedIn page only at their peril: “[A] lawyer who adopts or endorses information on any [social media] web site becomes responsible for conforming all information in the lawyer’s listing to the Rules of Professional Conduct.”<sup>61</sup> Luckily, LinkedIn has recently implemented other changes (in response to feedback from lawyers as well as nonlawyers) that allow a user to easily manage her Skills and Endorsements section by deleting any skill completely and hiding (although not deleting) some or all of her endorsements.<sup>62</sup> A user also has complete control over what skills get added to her profile.

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<sup>57</sup> S.C. Bar Ethics Advisory Comm. Op. 09-10 (“[A]ll information contained therein . . . [is] subject to the rules governing communication and advertising once the lawyer claims the listing.”).

<sup>58</sup> *Id.*

<sup>59</sup> *Guidelines for Networking Sites*, *supra* note 3.

<sup>60</sup> MODEL RULES OF PROF’L CONDUCT R. 7.1 cmt. 1 (2013) (“Whatever means are used to make known a lawyer’s services, statements about them must be truthful.”).

<sup>61</sup> S.C. Bar Ethics Advisory Comm., Op. 09-10.

<sup>62</sup> Interview with Catalin Cosovanu, *supra* note 20.

Finally, it is possible to hide the content of this entire section in an abundance of caution, especially if an attorney practices in a jurisdiction with strict rules against holding oneself out as an expert or claiming a specialty.

Another potential issue is some states' bans on testimonials.<sup>63</sup> If, as allowed on Avvo, a client posts a story about a great success and his attorney's wonderful work on his behalf, could that constitute a testimonial in violation of the ethics rules? Similarly, some states allow testimonials, but mandate that specific disclaimers or labels must be added to such posts.<sup>64</sup> Finally, some states may allow clients to post general "endorsements" of their attorneys in some circumstances, but not testimonials.<sup>65</sup> If a client's extremely enthusiastic post crosses the line from an endorsement to a testimonial as that is interpreted in a particular state, must an attorney in that state ask the client to recast the comment in more neutral language or over more general themes?

In summary, an attorney should expect that she will be held accountable for all information posted on any site that she controls, even if the information was placed there by third parties. She should also expect to be obligated to ask third parties to remove any misleading or incorrect information she discovers, even if she does not control the site. Addressing LinkedIn endorsements, at least one state has counseled its members to "hide" all LinkedIn endorsements.<sup>66</sup> To be safe, if an attorney's state does not allow testimonials generally, she should monitor third party posts to her profile just as she would monitor what she uses on her website or in written advertising material. In general she should be as vigilant over what she says on her social media profile, no matter the source of the post, as she is about what she says in person.

## 2. Asking for Endorsements or Recommendations

Given the controversy surrounding the Skills and Endorsements section of the LinkedIn profile, an attorney might conclude that it is not worth the risk to allow third party recommendations at all on his profile. But it is clearly powerful

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<sup>63</sup> See, e.g., WYO. RULES OF PROF'L CONDUCT R. 7.1(d) (2012).

<sup>64</sup> See, e.g., CAL. RULES OF PROF'L CONDUCT R. 1-400 (Standards).

<sup>65</sup> S.C. Bar Ethics Advisory Comm. Op. 09-10.

<sup>66</sup> *Id.* ("A lawyer should not solicit, nor allow publication of, testimonials . . . If any part of the listing cannot be conformed to the Rules (e.g., if an improper comment cannot be removed), the lawyer should remove his or her entire listing and discontinue participation in the service.").



and persuasive to have someone else vouching for your credibility. If, on balance, an attorney decides that he would like to allow endorsements, there is an additional question. Should he ask a colleague or a client to post something supportive to his profile?

Assuming what an attorney posts meets all other ethical requirements of advertising under the state rules (e.g., truthful, not misleading, not violating confidentiality, posted with relevant disclaimers and labels if necessary, not sent as an unsolicited real-time communication, not implying a specialty and not qualifying as a testimonial, etc.), and the attorney takes responsibility for the material once it is posted, he *can* request such recommendations or endorsements.<sup>67</sup> But he must ensure not to offer any payment in return, whether monetary or in kind (even a reciprocal recommendation). If he has compensated the colleague or client for the courtesy, he has violated MR 7.2.<sup>68</sup>

### III. BEING MINDFUL OF BREACHING CLIENT CONFIDENTIALITY

Most IP practitioners avoid breaching client confidentiality in the physical world. They safeguard files, mark and control client communication, and watch what they mention to whom. In a perfect world, it should be no different online. Yet the online world, particularly the world of social media, presents unique temptations and challenges. Because communication through social media may be more personal and casual than in person, and because the culture demands that an attorney post quickly or chance losing the attention of his followers, it is easy to err and offer more information than may be technically allowed under confidentiality obligations. In addition, because the communication is widespread and instantaneous, the impact of a violation is exponentially more severe than in the physical world.

To give one example, suppose a lawyer tweets procedural information about his case from court, being careful to only include public information, as in: “Patent trial is finally over! We won on summary judgment!” Could that possibly violate the Rules? Unfortunately, yes. MR 1.6 states that “[a] lawyer shall not

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<sup>67</sup> *Id.*; Steven W. Kasten, *Professional Ethics and Social Media*, 55 BOSTON B.J. 40, 41 (2011); see MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 5 (2013) (discussing the general impermissibility of paying others to recommend a lawyer); Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 2012-03.

<sup>68</sup> Kasten, *supra* note 67, at 41; see MODEL RULES OF PROF'L CONDUCT R. 7.2 cmt. 5 (2013); Conn. Bar Ass'n Prof'l Ethics Comm., Informal Op. 2012-03 (as applied to Connecticut's Rule 7.2(c)).

reveal information relating to the representation of a client unless the client gives informed consent . . . .”<sup>69</sup> In other words, simply because this is his client, the lawyer is bound to preserve even public information about the case under MR 1.6.<sup>70</sup> This is especially difficult to understand when the same information might be tweeted, without any ethical violation whatsoever, by a reporter, a bystander, or even another lawyer from a different firm attending the trial, but whom is not part of the case. The lawyer must secure informed consent from his client before he may tweet.<sup>71</sup>

Informed consent is also a slippery concept. A law firm might include a standard phrase in its form engagement letter that secures the client’s permission for the firm to use the client’s name, logo, and information about the representation in social media for promotional purposes. Does that consent extend to all information? If the letter was signed two years ago, is the consent still valid? Is there any limit on exactly what the firm can do with the identifying information? Compare this engagement letter consent to the situation where the informed consent is much more immediate and tailored, for example when an attorney shows a draft blog posting to a client for approval, just moments before it is uploaded. It is difficult to assert that the engagement letter method grants completely informed consent.<sup>72</sup>

An additional scenario presents itself when a client posts a negative review of his lawyer’s services on social media. Can the lawyer reveal client confidential information in order to defend himself from a bad review? MR 1.6(b)(5) says that it is acceptable to reveal confidential information “to respond to allegations in any proceeding concerning the lawyer’s representation of the client.”<sup>73</sup> But in one very public case that played out on Avvo, a client posted a derogatory review of his counsel where he accused her of taking a fee to

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<sup>69</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2013).

<sup>70</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 3 (2013) (“The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.”).

<sup>71</sup> *See id.*

<sup>72</sup> Helen W. Gunnarsson, *Friending Your Enemies, Tweeting Your Trials: Using Social Media Ethically*, 99 ILL. B.J. 500, 501–02 (2011).

<sup>73</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(5) (2013).

represent him when she knew he could not recoup a monetary award.<sup>74</sup> The attorney responded that the client had made the case impossible to win because of his “own actions in beating up a female coworker.”<sup>75</sup> Although the case settled before judgment, the attorney had to agree to a reprimand from the State Bar.<sup>76</sup>

Was that the right result given Rule 1.6(b)(5)? Possibly so, because there was no “proceeding,” even though the attorney must have felt harmed by the public accusation. In addition, perhaps the Rules require lawyers to hold themselves to a higher standard. As one commentator to the ABA article on the incident pointed out:

Our recourse is the same as every other profession...Soldier on!! Would it be ethical for a doctor to disclose a medical condition, or your account[ant] to publicize your Grand Cayman accounts because you posted a bad review? Of course not... If a posting rises to the level of slander or extortion[,] take legal action. Otherwise, rely on you [sic] good work and reputation to carry you through.<sup>77</sup>

What can a practitioner do to share information related to his case that would be of interest to his followers, friends, and contacts? He could get informed consent from his client to reveal the specific information. He could also report on others’ cases, for which he has no Rule 1.6 duty. He could also comment on the underlying legal theories that his case challenges or represents. As long as he is careful about revealing actual facts, there is much information a practitioner may tweet.<sup>78</sup>

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<sup>74</sup> Joint Stipulation, Betty Tsamis (2014) (Comm’n. No. 2013PR00095), *available at* [http://www.iardc.org/HB\\_RB\\_Dispatch\\_Html.asp?id=11221](http://www.iardc.org/HB_RB_Dispatch_Html.asp?id=11221).

<sup>75</sup> Complaint, Betty Tsamis (2014) (Comm’n. No. 2013PR00095), *available at* <http://www.iardc.org/13PR00095CM.html>.

<sup>76</sup> Joint Stipulation, *supra* note 74.

<sup>77</sup> Frsnojake, Comment to *Lawyer’s response to client’s bad Avvo review leads to disciplinary complaint*, A.B.A. J. ONLINE (Sept. 13, 2013, 3:00 PM), [http://www.abajournal.com/news/article/lawyers\\_alleged\\_response\\_to\\_bad\\_avvo\\_review\\_leads\\_to\\_disciplinary\\_complaint/?utm\\_medium=email&utm\\_campaign=weekly\\_email&utm\\_source=maestro&sc\\_cid=130911AE](http://www.abajournal.com/news/article/lawyers_alleged_response_to_bad_avvo_review_leads_to_disciplinary_complaint/?utm_medium=email&utm_campaign=weekly_email&utm_source=maestro&sc_cid=130911AE).

<sup>78</sup> Gunnarsson, *supra* note 72, at 502–03.

In summary, the quick, short bursts of information that mark communication through most social media is an anathema to the thoughtful, measured thinking that usually bolsters efforts to keep client information confidential. The desire to be timely, relevant, and interesting worsens a situation ripe for an ethical slip. Just as the likelihood of a violation increases, the consequences of disclosure also escalate with the possibility of widespread instant dissemination. Before pressing <send,> practitioners have to consider whether the client has given specific approval for that message to go out to the world.

#### IV. USING SOCIAL MEDIA FOR DISCOVERY

Social media can be a potent discovery tool. Just as e-discovery changed what documents lawyers requested, and how lawyers saved information, some academics postulate that social media will bring about an equally exponential shift in discovery policy and practice.<sup>79</sup>

##### A. Accessing Public Profiles and Feeds

Some bar associations have considered the issue of accessing public profiles.<sup>80</sup> They unanimously agree that this practice is in compliance with the ethical rules.<sup>81</sup> As is the case with any other public record, this information is neither privileged nor private.<sup>82</sup> State court opinions have even quoted Facebook's own terms of use as justification, which (at the time of the opinion) stated that users should "keep in mind that if you disclose personal information in your profile or when posting comments, messages, photos, videos,

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<sup>79</sup> See John G. Browning, *Keep Your "Friends" Close and Your Enemies Closer: Walking the Ethical Tightrope in the Use of Social Media*, 3 ST. MARYS J. LEGAL MALPRACTICE AND ETHICS 204, 207 (2013); see generally Sandra Hornberger, *Social Networking Websites: Impact on Litigation and the Legal Profession in Ethics, Discovery, and Evidence*, 27 TOURO L. REV. 279 (2011).

<sup>80</sup> See, e.g., N.Y. State Bar Ass'n Comm. Prof'l Ethics, Formal Op. 843 (2010); Oregon State Bar Association, Formal Op. 2013-189 (2013).

<sup>81</sup> N.Y. State Bar Ass'n Comm. Prof'l Ethics, Formal Op. 843; Oregon State Bar Association, Formal Op. 2013-189.

<sup>82</sup> N.Y. State Bar Ass'n Comm. Prof'l Ethics, Formal Op. 843; Oregon State Bar Association, Formal Op. 2013-189.

Marketplace listing or other items, this information may become publicly available.”<sup>83</sup>

## **B. *Accessing Private Profiles and Feeds***

A more interesting question is whether an attorney can access social media accounts that are protected as private. What Rules might be implicated, and what do the courts and state bars associations say? This is usually discussed in the context of Facebook, where the attorney would have to be affirmatively accepted as a “Friend” by the user in order to gain access. This could also be the case with LinkedIn, where the user would have to “Accept [the attorney’s] Invitation” to become connected, or Twitter, if the user has reset the general settings such that the attorney could not “Follow his Feed” until the user accepts him as a “Follower.”

### **1. *The Opposing Party’s Site***

Because the opposing party is represented, Rule 4.2 mandates that all contact go through counsel.<sup>84</sup> Therefore, sending a friend request, a request to follow, or an invitation to connect is not allowed.<sup>85</sup> Access to the contents of a private site needs to come from other means. For example, an attorney can officially request access to private sites through discovery requests, usernames and passwords through interrogatories, specific information through depositions, and printouts of the history of the posts through document requests.<sup>86</sup> The attorney can also specifically ask for the party’s consent to access all social media sites and compel the discovery if there is resistance.<sup>87</sup>

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<sup>83</sup> Romano v. Steelcase Inc., 30 Misc. 3d 426, 434 (2010) (quoting *Facebook Principles*, FACEBOOK (Nov. 26, 2008), <https://www.facebook.com/legal/terms>).

<sup>84</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 (2013).

<sup>85</sup> See San Diego Cnty. Bar Legal Ethics Comm., Formal Op. 2 (2011)

<sup>86</sup> Facebook has specifically rolled out an application that allows a user to download his entire posting history. *How can I download my information from Facebook?*, FACEBOOK, available at <https://www.facebook.com/help/212802592074644> (last visited Jan. 11, 2015).

<sup>87</sup> Sharon R. Klein et al., *Ethical Issues that Arise from Social Media Use in Courtrooms*, PEPPER HAMILTON (Oct. 14, 2013), available at [http://www.pepperlaw.com/publications\\_article.aspx?ArticleKey=2769](http://www.pepperlaw.com/publications_article.aspx?ArticleKey=2769).

This is a far more effective technique than to rely on a third party subpoena to get the information from the social media sites themselves.<sup>88</sup> Generally, the third party sites will not respond to a subpoena unless the requesting attorney has the user's consent to access the information, or he has secured a court order (which is unlikely unless he also has secured the user's consent).<sup>89</sup> Facebook's terms of use state it this way: "We may access, preserve and share your information in response to a legal request (like a search warrant, court order or subpoena) if we have a good faith belief that the law requires us to do so."<sup>90</sup>

## 2. Sites of Other Parties

But an attorney might also get valuable information by gaining access to the private sites of witnesses, friends of the opposing party, or other interested people that are not represented by counsel. Other than issuing a subpoena, is the attorney operating within the Rules to attempt to access those sites through a friend request hoping that the target responds favorably? What Rules guide this behavior, and how do the courts and state bar associations respond?

Generally lawyers may request to connect to the privately-held information of unrepresented parties, so long as they do not engage in deceptive practices.<sup>91</sup> What constitutes a deceptive practice in violation of the Rules, however, depends on the facts, and to some extent on the jurisdiction. For example, in an advisory fact pattern presented to both the Philadelphia Bar Association Professional Guidance Committee and the San Diego County Bar Association, the lawyer wanted to send a friend request to a relevant party, using truthful information, but without revealing his purpose in doing so. Both bar associations deemed the behavior deceptive, in violation of the ethical rules.<sup>92</sup>

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<sup>88</sup> Joel P. Schroeder & Leita Walker, *Social Media in Civil Litigation*, FAEGER BAKER DANIELS (Oct. 14, 2010), available at <http://www.faegrebd.com/12201>.

<sup>89</sup> *Id.*

<sup>90</sup> *Data Use Policy*, FACEBOOK, [https://www.facebook.com/full\\_data\\_use\\_policy](https://www.facebook.com/full_data_use_policy) (last visited Jan. 2, 2015).

<sup>91</sup> See San Diego Cnty. Bar Legal Ethics Comm., Formal Op. 2; Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-2; Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2010-2.

<sup>92</sup> San Diego Cnty. Bar Legal Ethics Comm., Formal Op. 2; Phila. Bar Ass'n Prof'l Guidance Comm., Formal Op. 2009-2. In the case of San Diego, the behavior violated California's Business and Professionals Code section

The Philadelphia Bar also claimed that such conduct would constitute professional misconduct under Rule 8.4(c), which cautions lawyers not to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”<sup>93</sup>

The Philadelphia Bar also addressed whether the lawyer could instead ask an agent to “friend” the target, using only truthful statements, but still concealing the purpose of the “friend request.” The Bar concluded that such an action would violate both Rule 8.4(a) (it is professional misconduct to “(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another”) and Rule 5.3(c)(1) (“a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if....(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved . . .”).<sup>94</sup>

Neither Bar considered whether the conduct would also violate Rule 4.3, which demands candor from an attorney when dealing with an unrepresented person. That Rule specifically states:

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.<sup>95</sup>

Arguably, the lawyer might be bound to disclose his role in the trial or deal, and why he is asking for access to the party’s social media information.

In contrast, the Association of the Bar of the City of New York Committee on Professional Ethics issued an opinion in which the Bar specifically

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6068(d) and a common law duty, and in the case of Philadelphia, the behavior was in violation of Pennsylvania’s equivalent of Rule 4.1, which prohibits “mak[ing] a false statement of material fact or law to a third person.” Phila. Bar Ass’n Prof’l Guidance Comm., Formal Op. 2009-2.

<sup>93</sup> MODEL RULES OF PROF’L CONDUCT R. 8.4(c) (2013).

<sup>94</sup> Phila. Bar Ass’n Prof’l Guidance Comm., Formal Op. 2009-2; MODEL RULES OF PROF’L CONDUCT R. 5.3(c)(1), 8.4(a) (2013).

<sup>95</sup> MODEL RULES OF PROF’L CONDUCT R. 4.3 (2013).

allowed an attorney to issue a friend request without revealing his purpose.<sup>96</sup> So long as the friend request itself used the sender's real name and thus was not inherently deceptive, the attorney or agent did not have to tell the recipient what purpose he had in seeking the invitation.<sup>97</sup> The New York City Bar opinion distinguished this behavior from unethical behavior, such as creating a false Facebook profile in order to dupe the recipient into accepting the friend request under false pretenses.<sup>98</sup>

The Oregon State Bar came to a similar conclusion as the New York City Bar, stating that lawyer or his agent could send a friend request, not revealing the purpose of the request, so long as the lawyer's behavior comported with Oregon's version of Rule 4.3.<sup>99</sup> It was up to the recipient to decide whether or not to accept the request, and the lawyer needed only clarify his purpose if the unrepresented person was operating under a misunderstanding as to the lawyer's role.

This practice of informal discovery could be analogized to a long-approved information-gathering method quite familiar to IP practitioners—the practice of using agents to buy products from a competitor under assumed names and circumstances in order to establish infringement. Social media could likewise be used elsewhere in an intellectual property practice to provide valuable evidence, for example, by sending out a tweet or Facebook message to a group to test for actual confusion, gaining access to a private YouTube account to check for misuse of copyrighted material, or checking on Twitter for hashtag use of either a client's or an accuser's trademark. Determining whether these

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<sup>96</sup> Ass'n of the Bar of the City of New York Comm. on Prof'l and Judicial Ethics, Formal Op. 2010-2 (2010).

<sup>97</sup> *Id.* at 2 (“Consistent with the policy [of informal discovery], we conclude that an attorney or her agent may use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.”).

<sup>98</sup> *Id.* at 2–3.

<sup>99</sup> Oregon State Bar Ass'n, Formal Op. 2013-189 at 579–80 (“Lawyer may request access to non-public information if the person is not represented by counsel in that matter and no actual representation of disinterest is made by Lawyer . . . . A simple request to access nonpublic information does not imply that Lawyer is ‘disinterested’ in the pending legal matter. On the contrary, it suggests that Lawyer is interested in the person’s social networking information, although for an unidentified purpose.”).



discovery methods are advisable under the Rules involves a similarly nuanced analysis, which might turn on the jurisdiction.

In summary, whether or not such practices might constitute violations of the Rules seems to turn on the facts, and where the local bar association stands on consumer protection. Some associations seem to take a more paternalistic approach to the “caveat emptor” philosophy. Although all bar associations would likely agree that an attorney that creates a fake Facebook profile in order to fool a party into granting access to private information violates the Rules, some bar associations are also willing to impute an additional duty onto the attorney to offer unsuspecting consumers an additional warning. Lawyers who practice in one of these jurisdictions should proceed with care.

## V. SOME ISSUES INVOLVED WITH USING SOCIAL MEDIA IN THE LITIGATION CONTEXT

Besides the confidentiality limitations on counsel reporting progress from court, bar associations have commented on other uses of social media in court. Specifically the discussion centers on (1) accessing jurors’ social media accounts, either to research them or to ensure they are not communicating inappropriately during a trial; and (2) judges’ use of social media.

### A. *Checking Up on Jurors*

#### 1. **During Voir Dire**

Social media provides a great opportunity for an attorney to learn more about potential jurors. Not only can an attorney get a broader picture of the person they are considering in voir dire, but also they can double-check the veracity of the potential juror’s responses. Is it an ethical violation to investigate potential jurors in this way? Unlike when an attorney checks public accounts of witnesses or other unrepresented parties, at least one judge has stated that it is against public policy to research jurors, even using publicly-available information, because “There’s a real potential for a chilling effect on jury service, by jurors, to know ‘I’m going to go out to the courthouse. [. . . ]I’m going to be Googled. They’re going to find all kinds of stuff on me[.]’ . . . .”<sup>100</sup> Most other courts are less concerned about using publicly-available information, although

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<sup>100</sup> St. John Barned-Smith, *Montgomery judge denies Internet searches for jury selection*, GAZETTE (May 15, 2013), available at <http://www.gazette.net/article/20130515/NEWS/130519448/1123/montgomery-judge-denies-internet-searches-for-jury-selection&template=gazette>.

even in those instances (1) the juror must not be able to know about the research, and (2) if counsel uncovers an inconsistency between what a juror stated in voir dire and what is on his social media site, counsel must report the inconsistency to the court.<sup>101</sup>

As a practical matter, it is easy for an attorney to hide his presence on Facebook and Twitter because an account holder does not see visitors to his public feed.<sup>102</sup> LinkedIn, however, has a function where it monitors and reports the names and titles of any visitors to a profile.<sup>103</sup> If an attorney intends to research a juror, he should ensure his privacy settings on the platform are set to hide his presence.

In addition, on the exact opposite end of the spectrum, at least one court has attributed an affirmative *duty* that attorneys check publicly available information on prospective jurors, at least in order to check to see if they answered truthfully about whether they have ever served on another jury.<sup>104</sup> But, this case was limited to the one database, and did not state that the duty extended to other sources of public information.<sup>105</sup>

Could counsel take the next step to access a prospective juror's private feed by sending a friend request or subscribing to her Twitter accounts? Consistent with what might be expected, the answer, even in relatively social media user-friendly New York City, is no. Because most courts insist that counsel's attempts to view even public pages of potential jurors remain stealthy, it is not surprising that courts would discourage affirmative attempts to communicate with a potential juror, even if the attempt involved no deception.<sup>106</sup>

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<sup>101</sup> See N.Y. Cnty. Comm. on Prof'l Ethics, Formal Op. 743 (2011) (citing N.Y. RULES OF PROF'L CONDUCT R. 3.5(d)); Ass'n of the Bar of the City of N.Y. Comm. on Prof'l & Judicial Ethics, Formal Op. 2012-2 (2012); Oregon State Bar Ass'n, Formal Op. 2013-189 (2012).

<sup>102</sup> *Common Myths About Facebook*, FACEBOOK, <https://www.facebook.com/help/369078253152594/> ("No, Facebook doesn't let people track who views their profile. Third-party apps also can't provide this functionality.").

<sup>103</sup> *Who's Viewed Your Profile—Frequently Asked Questions*, LINKEDIN, [https://help.linkedin.com/app/answers/detail/a\\_id/42/ft/eng](https://help.linkedin.com/app/answers/detail/a_id/42/ft/eng).

<sup>104</sup> See *Johnson v. McCullough*, 306 S.W.3d 551, 558–59 (2010) (en banc).

<sup>105</sup> *Id.* (limiting searches of venire members' past litigation history to Case.net).

<sup>106</sup> Model Rule 3.5 is also consistent with this holding in spirit, because under that Rule a lawyer may not "(a) seek to influence a . . . prospective juror . . .

As the Committee on Professional Ethics of the Bar of the City of New York Opinion summarized:

[I]t is proper and ethical under [NY] Rule 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, *provided that there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send jurors tweets or otherwise contact them.*<sup>107</sup>

In summary, although some courts have worried about possible public policy implications of allowing attorneys to investigate prospective jurors using publicly available information on social media, most courts allow—or even encourage—such investigation. So long as the attorneys investigate without contacting the juror (including through passive means, as occurs when a social media platform reveals who has “visited” a profile), and attorneys reveal to the court any information that undermines what a prospective juror has stated during voir dire, such investigation comports with the Rules.

## 2. During and After the Case

Jurors are instructed and bound by the judge not to talk about the case during their jury service lest they spoil the sanctity of a fair trial. Yet courts report that they cannot easily check jurors' social media use.<sup>108</sup> As a result, most courts allow attorneys to check on jurors and report any violations.<sup>109</sup> This right clearly extends to public pages and could conceivably extend to private pages, so long as the lawyer proceeds only with the judge's authorization so as not to violate Rule 3.5(b).<sup>110</sup> Just as during voir dire, courts state that a lawyer is under an obligation to report any instance of juror communication that contravenes a court order.<sup>111</sup>

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by means prohibited by law” or “(b) communicate ex parte with such a person during the proceeding unless authorized to do so by law or court order.” MODEL RULES OF PROF'L CONDUCT R. 3.5 (2013).

<sup>107</sup> Ass'n of the Bar of the City of New York Comm. on Prof'l Ethics, Formal Op. 2012-2 (emphasis added).

<sup>108</sup> Klein et al., *supra* note 87.

<sup>109</sup> *Id.*

<sup>110</sup> MODEL RULES OF PROF'L CONDUCT R. 3.5(b) (2013).

<sup>111</sup> Klein et al., *supra* note 87.

Once the jury has been discharged, can a lawyer “friend” a juror? There is much less written about this scenario, but just as with any other instance of communication, a lawyer may likely contact a juror through social media after the case is over.<sup>112</sup> Other than the usual limitations imposed by Rule 4.3 guiding contact with an unrepresented person, the lawyer should only be limited if: “(1) the communication is prohibited by law or court order; (2) the juror has made known to the lawyer a desire not to communicate; or (3) the communication involves misrepresentation, coercion, duress or harassment.”<sup>113</sup>

### **B. *Being “Friends” with a Judge***

Judges are not immune to the lure of social media use or the scrutiny surrounding such use. Just as it is an effective business tool for attorneys, elected judges especially might use social media as a component of their public campaigns. In addition, several states<sup>114</sup> and the ABA itself<sup>115</sup> have recognized a public interest in having judges connected to the communities they serve. But judges’ impartiality is so paramount to the administration of a fair trial that even the appearance of impropriety violates the Model Code of Judicial Conduct (the “Code”), the judicial analogy to the Rules.<sup>116</sup> Of the fair amount of discussion about judges’ use of social media, this article focuses on one sub issue, chosen because it also impacts practitioners’ ethical use of social media: should judges be allowed to connect to/friend/follow or be followed by the attorneys that advocate before them without violating rules protecting the impartiality of the court?<sup>117</sup>

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<sup>112</sup> MODEL RULES OF PROF’L CONDUCT R. 3.5 cmt. 3 (2013).

<sup>113</sup> MODEL RULES OF PROF’L CONDUCT R. 3.5 (c) (2013).

<sup>114</sup> *See, e.g.*, California Judges Ass’n, Judicial Ethics Committee, Op. 66, 4 (2010); Ethics Comm. of the Kentucky Judiciary, Formal Judicial Ethics Op. JE-119, 5 (2010); South Carolina Advisory Comm. on Standards of Judicial Conduct, Op. 17-2009.

<sup>115</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462, 2 (2013)

<sup>116</sup> Canon 1 of the ABA Model Rules of Judicial Conduct states that “[a] judge shall uphold and promote the independence, integrity and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety.” MODEL CODE OF JUDICIAL CONDUCT Canon 1 (2011).

<sup>117</sup> Most of the cases concern Facebook, so I will discuss “friending.” Many of the cases are stated in broad terms, however, so the opinions could apply to other forms of social media.

There are a number of thoughtful opinions on the subject from the state supreme court committees on judicial ethics and also the ABA itself.<sup>118</sup> But they offer widely varying advice. Judges should of course otherwise comply with the canons of the Code as adopted by the state when posting updates or comments.<sup>119</sup> The specific questions, however, of whether and when judges can connect through social media with which attorneys and how the judge should handle such a connection, once the attorney appears before her in court, are not settled.

The state committees with the most lenient view see “friending” as nothing more than one more social interaction in the world.<sup>120</sup> They allow judges to establish a social media connection to attorneys without restriction. But the committees then put the onus on judges to consider the depth and quality of the particular relationship should the attorney come before the judge in court.<sup>121</sup> Judges could decide to take no action, to reveal the relationship to opposing counsel, or to even recuse themselves, but their choice would be fact specific. The ABA opinion,<sup>122</sup> and the states bar associations of New York<sup>123</sup>, Kentucky<sup>124</sup>,

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<sup>118</sup> See Fla. Judicial Ethics Advisory Comm., Op. 2009-20; Md. Judicial Ethics Comm., Published Op. 2012-07.

<sup>119</sup> Among other things, the states are concerned about, *ex parte* communication, undignified material or language, factual discovery about the parties, legal advice, and commenting about an ongoing case, all prohibited under the Code.

<sup>120</sup> Thomas G. Wilkinson, Jr., *Judges and Social Media*, COZEN 2-3 (Oct. 2013), [http://www.cozen.com/Templates/media/files/LEGAL%2016871329v1%20Judges%20and%20Social%20Media%20-%20PBA%20Civil%20Lit%20Newsletter%20\(7\)%20%20%20.pdf](http://www.cozen.com/Templates/media/files/LEGAL%2016871329v1%20Judges%20and%20Social%20Media%20-%20PBA%20Civil%20Lit%20Newsletter%20(7)%20%20%20.pdf).

<sup>121</sup> *Id.*

<sup>122</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462, 2-3 (2013) (“A judge who has an ESM [electronic social media] connection with a lawyer or party who has a pending or impending matter before the court must evaluate the ESM connection to determine whether the judge should disclose the relationship prior to, or at the initial appearance of that person before the court. In this regard, context is significant . . . . The judge must conduct the same analysis that must be made whenever matters before the court involve persons the judge knows or has a connection with professional or personally.”).

<sup>123</sup> N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176, 1 (2009) (“A judge must, therefore, consider whether any such online connections, alone or in

Maryland<sup>125</sup>, and Ohio<sup>126</sup> are in this category. These cases are mostly concerned with actual bias or prejudice and the erosion of public confidence in an independent judiciary.<sup>127</sup>

As a middle ground, California's is also a fact-based, contextual analysis that focuses on actual bias, yet comes to a different result. California specifically disallows "friending" of attorneys appearing before the judge, but allows "friending" otherwise.<sup>128</sup> Perhaps because the social media phenomenon was born from Silicon Valley, the California Committee understands that "friending" does not necessarily connote a strong relationship calling for a recusal, but it still advises judges to consider the facts surrounding their use of the social media to

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combination with other facts, rise to the level of a 'close social relationship' requiring disclosure and/or recusal.").

- <sup>124</sup> Ethics Comm. of the Ky. Judiciary, Op. JE-119, 3 (2010) ("The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not 'convey or permit others to convey the impression that they are in a special position to influence the judge.' Canon 2D. However, and like the New York committee, this Committee believes that judges should be mindful of 'whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship' which should be disclosed and/or require recusal.").
- <sup>125</sup> Md. Judicial Ethics Comm., Published Op. 2012-07 (2012) ("[I]t is the Committee's position that 'the mere fact of a social connection' does not create a conflict. As the California Judicial Ethics Committee aptly observed, '[i]t is the nature of the [social] interaction that should govern the analysis, not the medium in which it takes place.'").
- <sup>126</sup> Supreme Court of Ohio Bd. of Comm'rs on Grievances and Disputes, Op. 2010-07, 1 (2010) ("A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge . . . [But] to comply with Jud. Cond. Rule 2.11(A)(1), a judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification.").
- <sup>127</sup> See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 462; N.Y. Advisory Comm. on Judicial Ethics, Op. 08-176; Ethics Comm. of the Ky. Judiciary, Op. JE-119; Md. Judicial Ethics Comm., Published Op. 2012-07.
- <sup>128</sup> Cal. Judges Ass'n Ethics Comm., Op. 66, 1 (2010)

analyze to what extent there could be a real or perceived bias.<sup>129</sup> Looking at, for example, how many “friends” the judge has, whether she always accepts friend requests, how often the particular attorney might come before the judge, and how personal the judge’s page is (the more personal, the higher the potential bias) would help a judge analyze bias.<sup>130</sup> When a lawyer is appearing before the judge, however, California advises that a judge must “unfriend” or block communication with the lawyer to avoid the ethical violation of *ex parte* communication.<sup>131</sup>

Most of the remaining state committees categorically disapprove of judges “friending” any attorneys that may have a chance of appearing before them. These decisions are distinct in that they emphasize not only actual impropriety and bias, but also whether there is simply the appearance of impropriety. For example, the Massachusetts Committee on Judicial Ethics claims “judges may only ‘friend’ attorneys as to whom they would recuse themselves when those attorneys appeared before them.”<sup>132</sup> The Oklahoma Judicial Ethics Advisory Panel also advises a flat-out bar on allowing judges to “friend” attorneys that may appear before the court (and vice versa) based on no more than appearances of impropriety.<sup>133</sup>

Florida has taken up this issue on four distinct occasions, even escalating it to the state supreme court (although the Court refused to hear it). In each case, the Judicial Ethics Advisory Committee refused to allow judges to “friend” attorneys that might appear before them because it would violate Canon 2(b) of the Florida Code of Judicial Conduct, which states in relevant part that, “[a] judge shall not lend the prestige of judicial office to advance the private interests

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<sup>129</sup> *Id.* at 7–9.

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* at 10–11.

<sup>132</sup> Mass. Comm. on Judicial Ethics, Op. 2011-06, 1 (2011).

<sup>133</sup> Okla. Judicial Ethics Advisory Panel, No. 2011-3, ¶¶ 8–9 (2011) (“[W]hether such posting would mean that the party was actually in a special position is immaterial as it would or could convey that impression . . . We believe that public trust in the impartiality and fairness of the judicial system is so important that is imperative to err on the side of caution where the situation is ‘fraught with peril.’”).

of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge.”<sup>134</sup>

The appearance of impropriety is enough. In the first case, the Florida JEAC stated:

The issue, however, is not whether the lawyer actually is in a position to influence the judge, but instead whether the proposed conduct, the identification of the lawyer as a ‘friend’ on the social networking site, conveys the impression that the lawyer is in a position to influence the judge. The Committee concludes that such identification in a public forum of a lawyer who may appear before the judge does convey this impression and therefore is not permitted.<sup>135</sup>

Two years later, the Committee again considered Facebook “friending,” when a judge asked if she could get around the ban with a proper disclaimer to all her friends that would assure them that “friending” did not mean anything more than they were acquaintances.<sup>136</sup> The court again refused, stating:

[T]he Committee does not believe that such a disclaimer, as perceived by members of the public, would dispel the message which is conveyed by the presence of lawyers as “friends” on the judge’s Facebook page. The Committee rejects any contention that a judge can engage in unethical conduct so long as the judge announces at the time that the judge perceives the conduct to be ethical.<sup>137</sup>

Next, the court considered connecting on LinkedIn, because that platform is used generally for more professional use.<sup>138</sup> The Florida JEAC still refused: “The Committee does not believe that there is meaningful distinction in this regard between Facebook, and LinkedIn, a site used for professional networking,

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<sup>134</sup> FLA. SUPREME COURT CODE OF JUDICIAL CONDUCT, Canon 2 (2008), available at <http://www.floridasupremecourt.org/decisions/ethics/canon2.shtml>.

<sup>135</sup> Fla. Judicial Ethics Advisory Comm., Op. 2009-20, 3–4 (2009).

<sup>136</sup> Fla. Judicial Ethics Advisory Comm., Op. 2010-06.

<sup>137</sup> *Id.*

<sup>138</sup> Fla. Judicial Ethics Advisory Comm., Op. 2012-12.



because the selection and communication process is the same on both sites.”<sup>139</sup> Finally, the Florida JEAC considered Twitter.<sup>140</sup> It advised the judge not to be on a list of followers, nor to “favorite” any tweets. But the one concession the Florida JEAC made was that a judge could have a Twitter campaign account handled by a manager.<sup>141</sup>

The considerable split between the state opinions may indicate a varied understanding about what it means to connect with someone over social media. The New York, Kentucky, Maryland, and Ohio committees’ willingness to consider the content of the communication rather than focusing on the friending itself may indicate a growing comfort with social media and a more relaxed understanding of what “friendship” means on these sorts of platforms. The Massachusetts, Oklahoma, and Florida committees’ worry was about appearances.<sup>142</sup> Yet if social mores are changing such that fewer people impute a relationship solely from a connection through social media, we may be moving to a world where such interaction is not as clearly as suspect. But until there is consensus, at least one commentator recommends that judges and attorneys in jurisdictions that have not considered this issue look to the ABA Judicial Ethics Opinion, which is the only opinion that is national in scope.<sup>143</sup>

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<sup>139</sup> *Id.*

<sup>140</sup> Fla. Judicial Ethics Advisory Comm., Op. 2013-14.

<sup>141</sup> *Id.* (“In sum, the inquiring judge will not be in violation of Canon 2B if a Twitter account is created in that judge’s name. The most sensible way to use Twitter as a campaign tool would be for the judge’s campaign committee or manager to create and maintain the account.”).

<sup>142</sup> *See, e.g.,* Mass. Comm. on Judicial Ethics, Op. 2011-06 (citing Comm. to Section 2A which states, “[p]ublic confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety”).

<sup>143</sup> John G. Browning, *Why Can’t We Be Friends? Judges’ Use of Social Media*, 68 U. MIAMI L. REV. 487, 510–11 (2014) (citing ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 462, 4 (2013)) (“When used with proper care, judges’ use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.”).

## VI. CONCLUSION

Commentators like to use the term “Wild West,” to describe what is happening as courts apply ethics rules in the social media context.<sup>144</sup> But others point out that we are simply applying old conversations to new technology.<sup>145</sup> As with other disruptive technologies, as social media in a legal practice becomes more of a norm, practitioners will be better able to predict how to use the technology to best accomplish business and professional goals while still operating within the bounds of the Model Rules of Professional Conduct.

Law firms can control their risk best by following a few suggestions. They should set and enforce guidelines for all employees about posting information onto individual sites and require that only designated individuals post on behalf of the firm. Firms should designate a point person to manage all firm social media so all posts originate from one place with one approved voice. The same point person should review all professional LinkedIn and Facebook profiles created by its employees to make sure the profiles comply with the Rules, as well as offer training in how and what to post going forward. Finally, the firm should monitor firm mentions and quash violations, even if that means hiring an outside media monitor.

Individual attorneys should invest time, getting training if necessary, to understand how various social media platforms work. IP lawyers are generally a tech-interested group, but still should make it a point to know more about social media to benefit both their clients and themselves. IP lawyers need to be able to search and manipulate social media tools in order to provide good counsel. Professionally, IP lawyers should also know enough about social media to exploit the many advantages of these platforms, and also understand what information is available to whom to better navigate the ethics rules. As the changes to LinkedIn show, these platforms are also ever evolving, so re-education every few months is necessary.

Just as it is important for lawyers to understand the functionality of social media, it is critical for lawyers to keep up to date on the ethics opinions and rulings regarding social media in their specific jurisdictions. Hopefully, the interplay between social media and the ethics rules will settle into a general consensus as ever increasing numbers of lawyers use social media in their daily

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<sup>144</sup> See Adam W. Lasket, *Lawyers and LinkedIn Endorsements: Proceed With Caution*, 101 ILL. B.J. 14 (2013).

<sup>145</sup> See generally Hornberger, *supra* note 79.

practice. But, until that time, ongoing vigilance will help lawyers keep abreast of developments and use social media with confidence.